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IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 619

ZAREH NUBAR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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The petitioner prays that a writ of certiorari issue to review the judgment (R. 54) and the order denying rehearing (R. 85) of the United States Court of Appeals for the Fourth Circuit, which judgment and order reversed the decision of The Tax Court of the United States (R. 26).

Opinions Below

The opinion of the Tax Court is reported in 13 T. C. 566. The opinion of the Court of Appeals is reported in 185 F. (2d) 584. The *per curiam* opinion of the Court of Appeals denying petition for rehearing is reported in 185 F. (2d) 589.

Jurisdiction

Jurisdiction to issue the writ prayed for is vested in this Court by the Act of June 25, 1948, as amended by the Act of May 24, 1949 (28 USCA, Sec. 2101(c)). The order of the Court of Appeals denying rehearing was entered on December 20, 1950 (R. 85).

Questions Presented

1. Was the petitioner a resident or nonresident alien for Federal income tax purposes for the taxable years 1941 through 1944?

2. If petitioner was a nonresident alien, was he during such period engaged in trade or business in the United States by reason of his transactions in securities and commodity futures effected through United States resident brokers?

Statute and Regulations Involved

The statute and regulations involved are set forth in an Appendix to this petition.

Statement of the Case

This proceeding arises under the Federal income tax laws and involves the taxable years 1941 through 1944. The petitioner is an Egyptian citizen. His home is in Paris, France where he has resided for many years. On August 1, 1939, he came to the United States on a visitor's visa to see the New York World's Fair, to talk with Dr. Einstein and to travel in the United States and later in Central and South America (R. 9-11). His purposes in coming to the United States were unassociated with war or the prospect of war (R. 11). The petitioner's wife and two children remained at the family's summer home in Switzerland until May 1940 when they went to France, returning to their home in Switzerland early in 1941 (R. 14). The petitioner visited the World's Fair intensively, had an interview with Dr. Einstein and traveled in the United States (R. 14, 15). In April 1940, he visited the West Coast and made the first of four attempts to leave the United

States and enter Mexico (R. 12, 15). He then intended to continue on his travels to Central and South America and not to return to the United States (R. 12). The petitioner's application to enter Mexico was denied (R. 12). He renewed his attempt in June 1940 and this application was likewise denied (R. 12).

Petitioner returned to New York and in July 1940 made a third unsuccessful application to enter Mexico (R. 12). In the summer of 1940, he was advised by the French Consulate in New York that he could not return to France, occupied or unoccupied (R. 12). Petitioner thereafter went to Florida where in February 1941 he made his fourth application to go to Mexico which was again denied (R. 13). Returning to New York, he applied in April 1941 for a Swiss visa to join his family in Switzerland (R. 13). He also applied for French, Spanish and Portuguese visas, which he needed to travel through these countries on the way to Switzerland (R. 13). He was unable to obtain such visas, however (R. 13). A Swiss visa was granted to him in August 1941, but was valid for only one month beyond the date of receipt and was of no practical value without the visas for the intervening countries (R. 13). Unable to rejoin his family in Europe, petitioner remained in the United States until August 1945 when the termination of hostilities in Europe enabled him to depart and return to his home in France where he has lived ever since (R. 10). He remained in the United States for all this period only "because of the obstacles which war time conditions put in the way of his leaving the country and going to another one in which he could be admitted" (R. 22).[1] His desire and

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[1] Petitioner was but one of many aliens unable to leave the United States during the war and return to Europe because of visa complications, restricted shipping space, priority requirements, etc. See, e.g., the following reported cases in which individuals stranded in the United States were unable during the war to return to their homes in such countries as Denmark and Sweden: *McGrath* v. *Kristensen*, 340 U. S. 162; *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. A. 2); *Seeley* v. *Commissioner of Internal Revenue*, C. A. 2, decided January 2, 1951, not officially reported as yet (unofficially reported in 1951 P-H Fed. Tax Service, Par. 72,213).

intent were not to remain in the United States but to return to his family in Europe as soon as it was possible to do so (R. 21).

On January 15, 1941, a warrant of arrest was issued by the United States immigration authorities, charging that petitioner was in the United States in violation of the immigration laws and subject to deportation (R. 11). The warrant provided for his release on bond (R. 11). He was arrested and, after a deportation hearing, the Board of Immigration Appeals entered an order, dated February 3, 1944, requiring the petitioner to depart from the United States within 90 days after the termination of hostilities (R. 11). War time conditions made it impossible or impracticable for the immigration authorities to deport the petitioner to his home in Europe prior to the end of the European War (R. 21). The petitioner remained at liberty under bond until his voluntary departure in August 1945 (R. 11).

During his stay in the United States, the petitioner engaged in transactions in securities and commodity futures effected through United States resident brokers. As a result of such transactions, he realized substantial capital gains, the taxability of which is here in question (R. 15-17). If petitioner was a resident alien, he was taxable on such capital gains. If, however, he was a nonresident alien, he was not taxable thereon, unless, during the taxable years in question, such transactions constituted engaging in trade or business in the United States.

The petitioner contends that he was a nonresident alien during the years in question, since he was under constraint and incapable of exercising the volition basic to residence. The constraint was of two types: (1) inability due to war conditions to return to his home in Europe, despite repeated efforts and constant desire to leave the United States, and (2) inability under the immigration laws to remain in the United States beyond the period when the orders of arrest and deportation could be executed and the petitioner expelled. Either type of constraint would, peti-

tioner contends, have prevented him from exercising the free choice and free will essential to establishing a residence in the United States.

As to his transactions in securities and commodity futures while in the United States, petitioner contends that such could not constitute engaging in trade or business because they were effected directly through resident brokers and, under the express provision of Section 211(b) of the Internal Revenue Code, such transactions do not constitute engaging in trade or business. He also contends that, wholly aside from this provision of Section 211(b), engaging in such transactions for one's own account cannot constitute engaging in trade or business, no matter how extensive such transactions may be and regardless of whether they be of a speculative or investment nature.

The Tax Court sustained the petitioner's contentions both as to residence and as to engaging in trade or business. The Court of Appeals reversed on both points, holding that the petitioner was a resident alien for the years in question and that he was engaged in trade or business in the United States by reason of his securities and commodities transactions. As to the latter point, although the statute contains no such limitation, the Court held that the aforesaid express provision of Section 211(b) was not intended to apply to nonresident aliens who were physically present in the United States when the transactions were effected and was only intended to apply to nonresident aliens who were abroad when the transactions were effected.

Specification of Errors

The Court of Appeals erred:

(1) In holding that the petitioner was a resident alien during the taxable years in question.

(2) In exceeding its proper scope of review by making *de novo* findings of fact and by drawing inferences of fact, on conflicting evidence, contrary to those drawn by the Tax Court, such findings and inferences relating to the purpose

and intention of the petitioner in remaining in the United States.

(3) In holding that the express provision of Section 211(b) of the Internal Revenue Code (providing that the effecting by nonresident aliens of transactions in securities and commodity futures through resident brokers does not constitute engaging in trade or business in the United States) does not apply to nonresident aliens physically present in the United States.

(4) In holding that engaging in such transactions for one's own account constitutes engaging in trade or business, aside from the aforesaid statutory provision.

Reasons for Granting the Writ

1. The Residence Issue

The writ should be granted to review the residence issue because (a) the issue involves an important question of Federal income tax law which has not been, but should be, settled by this Court; (b) the principle of the instant decision is in conflict with decisions of this Court and of other Circuit Courts on the question of residence; and (c) the instant decision conflicts with decisions of this Court limiting the scope of review under Rule 52(a), Federal Rules of Civil Procedure.

(a) The instant case is the first to reach this Court involving the residence status for Federal income tax purposes of aliens, marooned in the United States by war time conditions arising out of World War II, who were unable for the duration to return to their homes abroad. The instant case has been regarded as a test case by the United States income tax authorities, and a substantial number of similar cases have awaited, and are awaiting, either in litigated or administrative stages, the ultimate decision in this case. The question as to the residence consequences of an enforced stay is one of paramount importance in the

administration of the income tax laws, both with respect to situations resulting from world-wide conflicts, and also with respect to other situations not caused by war where the taxpayer in question is deprived of any free exercise of volition as to his stay.

Particularly is this true in view of the fact that in the thirty-eight years in which the Federal income tax laws have been in effect, there has never been a decision of this Court on the subject of residence for income tax purposes. The question of residence has greatly troubled the Circuit Courts. The terms "residence" and "nonresidence" are "very slippery words" (Dobie, J. in *Swent* v. *Commissioner of Internal Revenue,* 155 F. (2d) 513, 515, C. A. 4). The regulations defining residence issued by the Treasury Department are themselves vague and unclear. After stating that the regulations appear to contain inconsistencies, Stephens, J. said in *Downs* v. *Commissioner of Internal Revenue,* 166 F. (2d) 504, 509 (C. A. 9):

> "* * * Despairing of being able to satisfactorily define the term 'resident,' the Treasury Department has resorted to a sort of inclusion-exclusion of the words 'resident' and 'transient' through statements of hypothetical facts. The word 'transient' is not mentioned in the act, and its use appears somewhat confusing. However, the regulation is to be used in *principle* only."

In this state of the law, and in the absence of any decision of this Court, under the Federal income tax law, on either the general subject of residence or the effect on residence of the element of constraint, the issue is one which should be reviewed by this Court so that taxpayers and income tax authorities may know where they stand with respect to the duties imposed by residence.

(b) *The decision of the Court of Appeals in the instant case directly conflicts in principle with the very recent decision of this Court in McGrath* v. *Kristensen, 340 U. S. 162, decided December 11, 1950.* In the *Kristensen* case, an alien

who came to the United States in 1939 for temporary purposes and was unable due to war time conditions to return to his home in Europe was held *not* to be a resident of the United States for purposes of the Selective Training and Service Act. *The factual parallel with the instant case is striking.* Both aliens came to the United States in August 1939, both came to see the New York World's Fair, both were admitted on temporary visas, both were unable to return to their homes in Europe due to war conditions, both were subject to orders of deportation and both remained in the United States for the duration of the war.[2] In the *Kristensen* case, this Court stated (p. 176) that it could not conclude, without regulations so defining residence, that "a *sojourn* within our borders made necessary by the conditions of the times was residence within the meaning of the statute" (italics added). It is clear that, in view of the circumstances, this Court regarded Kristensen as a mere sojourner despite the length of his stay. Under the Treasury Department's own Regulations (Reg. 111, Sec. 29.211-2), an alien who is a "mere sojourner" is not a resident alien for Federal income tax purposes. The conflict in reasoning of the instant case with the *Kristensen* decision is thus forcefully illustrated. *Moreover, in the instant case, as in the Kristensen case, there is the same absence of regulations defining residence as including a sojourn in the United States made necessary by war time conditions.*

It is true, of course, that the meaning of the term "residence" varies with the purpose and intent of the statute in which it is found. It is also true that the *Kristensen* case arose under a statute different from that here involved. But, as Judge Learned Hand pointed out in *Neuberger* v. *United States,* 13 F. (2d) 541, 542 (C. A. 2), in language

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[2] The instant case is even a stronger case of nonresidence than the *Kristensen* case. In the instant case the petitioner, after the termination of hostilities, returned to his home in France and has resided there ever since (R. 10). By contrast, Kristensen married an American citizen and settled down to permanent residence in the United States.

quoted with approval by this Court in its *Kristensen* decision (p. 175), "there is substantial unanimity that, *however construed in a statute,* residence involves some choice * * * and that *presence elsewhere through constraint has no effect upon it.*" (italics added). And, as the Court of Appeals for the District of Columbia said in the *Kristensen* case (179 F. (2d) 796, 801), "*wherever used* [in a statute], *the term* [*residence*] *has an irreducible minimum of meaning*" and "requires at least an abode which is in some degree permanent and *is the result of choice.*" (italics added). Again, at page 802, the Court of Appeals said:

> "* * * Presence in a foreign land because of war, and the attendant inability to return to one's own country, does not possess the volitional element which is basic to residence. * * *"

In view of the foregoing, it is clear that *no matter what statute is involved,* residence involves a free exercise of volition which does not exist in a case where the individual is under constraint. Since the petitioner was under constraint of two types (inability to return to his home and refusal of the immigration authorities to allow him to remain in the United States beyond the time when he could be expelled), there is a clear conflict in principle with the *Kristensen* case and with the *Neuberger* case as well.[3] *The conflict with the Kristensen decision is accentuated by what the Court of Appeals in the Kristensen case (p. 803) called "the similarity in origin of the obligation to pay taxes and the obligation of military service."*

(c) Finally, the decision in the instant case conflicts with the recent decisions of this Court in *United States* v. *Real Estate Boards,* 339 U. S. 485 and *United States* v. *Yellow Cab Co.,* 338 U. S. 338, in that the Court of Appeals exceeded its proper scope of review by making *de novo* findings of fact and, on conflicting evidence, drawing inferences of fact contrary to those drawn by the Tax Court. The Court of Appeals found as a fact that the petitioner's

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[3] The *Neuberger* case involved the residence status under the naturalization laws of an alien resident of the United States who was marooned in Germany during World War I.

original temporary purpose in coming to the United States "was superseded after the war had commenced and travel had become difficult and dangerous by the purpose to remain in the country until after the war" (R. 50) and found further that petitioner "had the intention of staying here until the war in Europe had ended and he could safely depart" (R. 48). These findings were either *de novo* findings of fact by the Circuit Court which has no power to make new findings of fact (*Helvering* v. *Rankin,* 295 U. S. 123), or they were inferences of fact, on conflicting evidence, which the Circuit Court had no power to substitute for those drawn by the Tax Court. As this Court said in the *Yellow Cab Co.* case (p. 341), the Government is not permitted to come to an appellate court "for what virtually amounts to a trial *de novo* on such findings as intent, motive and design," and, as this Court further stated in that decision, "a choice between two permissible views of the weight of evidence is not 'clearly erroneous.' "

The Tax Court found that the petitioner in late April 1940 intended not to return to the United States if he were granted entry to Mexico (R. 12); that petitioner remained in the United States only "because of the obstacles which war time conditions put in the way of his leaving this country" (R. 22); and that "almost all of the affirmative acts of the petitioner confirm his testimony that he did not intend to become a resident of the United States" (R. 21). The Tax Court completely rejected the contention which the Commissioner strenuously urged that the petitioner intended to remain in the United States for the duration of the war. The clear and inescapable implication of its findings is that the petitioner at all times intended to leave the United States and was only prevented from doing so by war time obstacles. The Tax Court's findings were supported by strong and substantial evidence as to the petitioner's efforts to leave the United States (R. 12, 13), as to his statements of intention expressed to friends and Government officials (R. 21), as to the practical impossibilities of war time travel (R. 21), as to the visa complications, particularly for an Egyptian citizen (R. 13, 14), etc.

Whatever conflicting evidence may be in the record (and it is slight), it was not within the province of the Court of Appeals which did not see or hear the witnesses to "give the facts another construction" and "resolve the ambiguities differently" (*United States* v. *Real Estate Boards, supra,* at p. 495).

It should be emphasized in conclusion that, even if we assume, *arguendo,* that the Court of Appeals was justified in finding that the petitioner intended to remain in the United States once he found that war time obstacles prevented his return to Europe, its conclusion that petitioner thereby became a resident was wholly unjustified and in direct conflict with the principle of the *Kristensen* and *Neuberger* cases. For residence, as is shown by those cases, necessarily involves freedom of choice. Carried to its logical conclusion, the reasoning of the Court of Appeals would mean that a prison inmate would become a resident of his prison, since once he found that he could not escape, he would be deemed to intend to remain where he was. This clearly is not the law. *United States* v. *Gronich,* 211 Fed. 548 (W. D. Wash., S. D.), and cases cited therein. Consequently, even accepting in full the new factual findings and inferences of the Court of Appeals, there was no basis in law for its conclusion.

2. The Doing Business Issue

The writ should be granted to review the doing business issue because (a) the issue involves an important question of Federal income tax law which has not been, but should be, settled by this Court and (b) the decision of the Court of Appeals conflicts in principle with decisions of this Court and of other Circuit Courts.

(a) This issue involves a statute which in plain, simple and unequivocal language declares that the effecting by nonresident aliens of transactions in securities and commodity futures through resident brokers shall not constitute engaging in trade or business in the United States. (For complete text of statute, see Appendix, *infra,* p. 19.) The Court of Appeals held in the instant case that this pro-

vision should be interpreted as not applying to such aliens when physically present in the United States. No report of any Congressional committee or other authority is cited to support this distinction read into the statute. In fact, the Court in its opinion ignored completely the legislative history of the statute, including several proposed and actual amendments to the statute, which provided that, for years *subsequent* to those here involved, a distinction should be made between nonresident aliens physically within and without the United States and that only under certain specified conditions should nonresident aliens physically present in the United States be subject to tax on capital gains effected in the United States.[4] ***The hearings and committee reports on these amendments show conclusively that not only Congress and the Joint Committee on Internal Revenue Taxation, but the Treasury Department itself, understood that under existing law such gains were not taxable to nonresident aliens merely because they were physically present in the United States.***[5]

Moreover, the Court of Appeals ignored the fact that Congress in the statute, and the Treasury Department in its regulations, have always used the term "nonresident alien" in its broadest sense without drawing any distinction whatsoever between such aliens physically present in the United States and those remaining abroad. Under court

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[4] See Hearings before Senate Finance Committee on H. R. 4790, 80th Congress, 2nd Session, p. 170, at which Senator Lodge offered such an amendment. A similar provision was contained in Section 143(a) of H. R. 6712, 80th Congress, 2nd Session. Neither of these provisions became law, but in Section 213 of the Revenue Act of 1950, Public Law 814, substantially similar provisions were enacted, effective January 1, 1950. These provisions are now found in Section 211(a)(1)(B) of the Internal Revenue Code.

[5] See Hearings before Senate Finance Committee, on H. R. 4790, 80th Congress, 2nd Session, p. 170; House Ways and Means Committee Report on H. R. 6712, 80th Congress, 2nd Session, p. 7; Hearings before House Ways and Means Committee on Revenue Revision of 1950, 81st Congress, 2nd Session, Vol. I, p. 74; Senate Finance Committee Report on Revenue Act of 1950, 81st Congress, 2nd Session, pp. 46, 92.

decisions in income tax cases extending as far back as 1931,[6] and under regulations of the Treasury Department itself,[7] it has long been recognized that aliens may be physically present in the United States and yet remain nonresidents. Under these conditions, Congress has repeatedly re-enacted the statute in question, and the Treasury Department has consistently maintained the same regulations in effect, without the slightest attempt on the part of either to limit the broad term "nonresident alien" to those outside the United States.

That Congress intended the provision relating to security and commodity transactions to apply to all nonresident aliens, whether physically within or without the United States is further established beyond doubt by other provisions in Section 211(b) not dealing with security and commodity transactions. In prescribing the circumstances under which the performance of personal services by nonresident aliens would constitute engaging in trade or business, Congress carefully distinguished between nonresident aliens "temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for [personal] service does not exceed in the aggregate $3,000," and those nonresident aliens who are here for longer periods. *Yet, in the very next sentence of the statute, relating to transactions with resident brokers, no distinction of any sort has ever been drawn between such transactions effected by nonresident aliens physically present in the United States and those effected by nonresident aliens remaining abroad.* On the contrary, the sentence is phrased in the broadest terms and with no exclusion whatever of any class of nonresident aliens. In view of the foregoing, the conclusion that Congress in referring to nonresident aliens meant only those outside the United States is on its

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[6] See, e.g., *Ingram* v. *Bowers*, 47 F. (2d) 925 (S. D. N. Y.), affd. 57 F. (2d) 65 (C. A. 2).

[7] See, e.g., Reg. 45, Art. 312, issued under Revenue Act of 1918. Similar provisions have been contained in the regulations issued under all the subsequent revenue acts.

face wholly unwarranted, especially when viewed in the light of the recent legislative history of the statute previously discussed herein.

The petition herein does not rest exclusively, however, upon the error in construction of the statute, important as that question continues to be.[8] Basic to the entire issue is the question whether, *even if no such statutory provision existed,* the petitioner could be deemed to have been engaged in trade or business. It is essential to support the decision of the Court below on this issue that the petitioner be found to have been engaged in trade or business. If the statutory exclusion does not apply, the question remains whether, aside from the statute, the petitioner was engaged in trade or business. *Consequently, the underlying question on the doing business issue is whether, under any circumstances, transactions in securities and commodity futures for one's own account may constitute "engaging in trade or business."* For purposes of Section 23(a)(1) of the Internal Revenue Code, this Court in 1941 affirmed a decision of the Board of Tax Appeals holding that market activities for one's own account, no matter how extensive, could not constitute "carrying on any trade or business," so as to permit the deduction of expenses incurred in connection therewith. *Higgins* v. *Commissioner of Internal Revenue,*

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[8] The provisions of Section 213 of the Revenue Act of 1950 have diminished the importance of the question of statutory construction for the future, but the issue remains significant for its effect (1) on other pre-1950 cases, pending in either litigated or administrative stages; (2) on securities transactions with United States resident brokers effected by nonresident foreign corporations through a United States agent, such corporations having under the statute a similar exemption for security and commodity transactions with resident brokers; (3) on the construction of the term "permanent establishment" in tax treaties with such countries as Canada, France, Sweden and the United Kingdom, to which treaties Section 213 of the 1950 Act has no application; and (4) on situations where nonresident aliens physically present in the United States for less than ninety days in the taxable year engage in securities transactions through resident brokers in volume while in the United States and continue such transactions from abroad (after leaving the United States) during the same taxable year.

312 U. S. 212. Since that decision, the principle involved has been applied, both with respect to Section 23(a) (1) *and with respect to other sections of the Code where the issue of engaging in, or carrying on, trade or business has arisen.* See, e.g., *Fuld* v. *Commissioner of Internal Revenue,* 44 B. T. A. 1268, affd. 139 F. (2) 465 (C. A. 2); *Burnett* v. *Commissioner of Internal Revenue,* 118 F. (2d) 659 (C. A. 5).[9] The question whether the principle involved in the *Higgins* case should have equal applicability in determining the question of doing business under Section 211 of the Code is one of the utmost importance in the administration of the income tax laws.

(b) *The decision in the instant case conflicts in principle with the decision of this Court in Higgins* v. *Commissioner of Internal Revenue, supra.* No sound reason is perceived, and none has been advanced, why the *Higgins* principle should not be applicable in determining the issue of doing business under Section 211 of the Internal Revenue Code.[10] As previously stated, the doctrine has been applied with respect to sections other than 23(a) (1). The Court below relied heavily on the *Fuld* decision, *supra,* to support its position on this issue. In the *Fuld* case, a distinction was drawn between personal market activities on an investment basis and similar activities on a speculative basis, only the latter being considered to constitute engaging in trade or business. Assuming, as the Tax Court found (R. 22), that the transactions of the petitioner herein were of a speculative

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[9] *Cf.* Senate Finance Committee Report on Revenue Act of 1950, 81st Congress, 2nd Session, p. 106, where in discussing the newly imposed tax on the unrelated business income of charitable and other exempt organizations, it is said: "As used in this section, the term 'trade or business' has the same meaning as it has elsewhere in the Code, as, for example, in Section 23(a) (1)."

[10] The argument that Congress would not have inserted the statutory exclusion in Section 211(b) if such transactions, apart from the statute, could not constitute engaging in trade or business, is unsound, since the exclusion was inserted in the statute prior to this Court's decision in the *Higgins* case and at a time when it was thought that even personal investment activities might constitute engaging in trade or business.

nature, it is contended that the distinction drawn between speculative and investment activities is an arbitrary and artificial one which this Court in its *Higgins* decision never contemplated would be drawn. This Court granted certiorari in the *Higgins* case because it stated that there was a conflict between the Second Circuit's decision in the *Higgins* case (111 F. (2d) 795) and the Sixth Circuit's decision in *Kales* v. *Commissioner of Internal Revenue* (101 F. (2d) 35). Since the *Kales* case was one of a taxpayer engaged in security transactions, not on an investment basis but on a basis of adventuring her own capital and securities, such fact indicates that this Court in granting certiorari intended to lay down only one rule for dealing in securities for one's own account, whether such dealings be on an investment, speculative or other basis. Furthermore, two other Circuits, in cases decided after this Court's decision in the *Higgins* case, have supported the position taken herein that personal market activities on a so-called speculative basis do not constitute engaging in trade or business. *Helvering* v. *Wilmington Trust Company*, 124 F. (2d) 156 (C. A. 3), reversed on other grounds, 316 U. S. 164; *Burnett* v. *Commissioner of Internal Revenue, supra.* In the *Wilmington Trust Company* case, the Court said (pp. 159, 160):

> "* * * The Board of Tax Appeals here can only distinguish its own conclusion in the Higgins case by calling the stock dealings speculative rather than investive because of their size and frequency. Taxpayer Higgins had not only one but two offices (one in Paris) and employed not one secretary but several. He was mainly interested, however, in just conserving and enhancing his own estate. In the present case, as in Kales v. Commissioner, the taxpayer was principally 'adventuring his [her] own capital in securities, yet is actively and continuously occupied in their purchase and sale.' We agree with Judge Patterson that it is a difference but not one of distinction. The Supreme Court gave some indication that no legal difference may be made of this factual difference when it granted certiorari in the Higgins case on the ground that the decision of the Second Circuit conflicted with Kales v. Commissioner."

Consequently, should the instant decision be supported on the ground that the petitioner's transactions herein were of a speculative nature, there is a clear conflict in principle on this point between the instant case and the *Fuld* decision, on the one hand, and the *Wilmington Trust Company* and *Burnett* decisions, on the other hand.

Wherefore, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

Henry Mannix,
Counsel for Petitioner.

Charles K. Rice,
Of Counsel.

APPENDIX

Internal Revenue Code:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

* * * * *

(b) *United States Business or Office.*—[11]A nonresident alien individual engaged in trade or business in the United States or having an office or place of business therein shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by *a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year* and whose compensation for such services does not exceed in the aggregate $3,000. *Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian.* (italics added)

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[11] The above provision was effective for the taxable year 1941. For the taxable years 1942 through 1944, the statute was the same, except that the phrase "or having an office or place of business therein" contained in the first sentence above was omitted and, in place of the last sentence in the above, the following sentence was added: "Such phrase does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities (if of a kind customarily dealt in on an organized commodity exchange, if the transaction is of the kind customarily consummated at such place, and if the alien, partnership, or corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected), or in stocks or securities.

Treasury Regulations 111, promulgated under the Internal Revenue Code:[12]

SEC. 29.211-2. Definition.—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States. The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or *sojourner* is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resi-

[12] These Regulations were effective for the taxable years 1942 through 1944. Treasury Regulations 103, effective for the year 1941, are not reproduced here since they are essentially the same as Treasury Regulations 111.

dent of the United States within the meaning of this section, in the absence of exceptional circumstances. (italics added)

SEC. 29.212-1. Gross income of nonresident alien individuals.—

• • • • •

(b) *United States Business.*—

• • • • •

The effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian does not bring a nonresident alien individual within the class of nonresident alien individuals engaged in trade or business within the United States, but if a nonresident alien individual by reason of rendering personal services in the United States, or for other reasons, is classed as a nonresident alien individual engaged in trade or business within the United States, he is taxable upon all income from sources within the United States, including profits derived from the effecting of such transactions. • • •

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 619

ZAREH NUBAR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court (R. 7-26) is reported at 13 T.C. 566. The opinion of the Court of Appeals for the Fourth Circuit (R. 44-53) is reported at 185 F. 2d 584. The opinion of the Court of Appeals denying the taxpayer's petition for rehearing (R. 84-85) is reported at 185 F. 2d 589.

JURISDICTION

The judgment of the Court of Appeals was entered on November 8, 1950 (R. 54). The order of

the Court of Appeals denying the petition for rehearing was entered on December 20, 1950 (R. 85-86). The petition for a writ of certiorari was filed on March 19, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly concluded that taxpayer was a resident of the United States within the meaning of Section 211(a) of the Internal Revenue Code.

2. Whether, if not, the Court of Appeals properly held that taxpayer was, in any event, engaged in trade or business within the United States within the meaning of Section 211(b) of the Code.

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 15-19.

STATEMENT

The material facts summarized by the Court of Appeals (R. 45-46) from the Tax Court's undisputed primary findings (R. 9-18) are as follows:

Taxpayer is a wealthy Egyptian national. Prior to World War II he lived with his family in France and Switzerland, maintaining an apartment in Paris and a summer home in Geneva. He arrived in the United States on August 1, 1939, and remained here constantly until August 15, 1945. His purpose in coming was to visit the New York World's Fair and to travel in this country and

in Central and South America. He was admitted on a three-month visitor's visa. After the war in Europe began, taxpayer applied for, and obtained, a number of extensions which expired on December 31, 1940. In January, 1941, he was arrested on a charge of being in the country in violation of the immigration laws. He was released on bond and applied for, and obtained, a number of delays in the proceedings. The Board of Immigration Appeals determined in 1944 that an order of deportation would not be entered at that time, but that the taxpayer would be required to leave the United States at his own expense within ninety days after the termination of hostilities in Europe. (R. 45.)

During 1940 and 1941, the taxpayer made applications for visas to visit Mexico, but these were denied. He was told by the French consulate in 1940, upon his inquiry, that he could not return to that country. In 1941, he was successful in obtaining a Swiss visa but could not obtain visas from the French, Spanish and Portuguese consulates. He abandoned the plan to return to Switzerland at that time because of "the delays in getting other visas, plus the dangers of wartime travel and poor health." Thereafter, for four years he made no further effort to leave the country, but settled down to wait out the war, and this he did very profitably. In making applications for extensions of visas, he asked as early as 1939 that he be allowed to

stay "for a year or until the end of the war." He made no real effort to leave the country for Europe until after the war was over. (R. 45-46.)

Prior to coming to this country, taxpayer had engaged in trading on stock and commodity exchanges on a large scale. In 1930, he opened accounts in New York with brokerage firms having Paris connections. In 1938, he transferred $165,000 to his account with one of these firms. This sum was used to purchase on margin securities which were sold shortly thereafter. When he arrived here the next year, taxpayer had a credit balance of $202,709 with this firm, $32,000 with another, and securities valued at approximately $100,000 deposited with a New York bank. When he left the country in 1945, he owned securities of a value of $2,496,952 and owed $721,423.53 for money which he had borrowed. (R. 46.)

Although taxpayer's accounts with his brokers were relatively inactive in 1939 and 1940, they became extremely active in the tax years. In 1941, there were 77 purchases of stocks and bonds and 60 sales; in 1942, 243 purchases and 60 sales; in 1943, 185 purchases and 111 sales; and in 1944, 125 purchases and 97 sales. The net capital gain on these transactions was $62,795, $62,281, $229,244 and $202,823, respectively. They involved the purchase of 217,423 shares of stock and a sale of 113,001 shares. The total value of the securities pur-

chased and sold was in excess of six and a half million dollars. (R. 46.)

During the same years, taxpayer was dealing in commodities futures, buying and selling "practically all" commodities, including cotton, wheat, sugar, pepper, silk and lard, on which he realized gains of $62,795 in 1941, $2,775 in 1943 and $1,660 in 1944. He sustained a loss of $4,162 in 1942. Since the trading in both securities and commodities was on exchanges, the orders were effected through brokers. All of the trading occurred on margin and required the constant attention of the taxpayer while he was living in the United States. (R. 46.)

The Commissioner determined deficiencies for 1941, 1943 and 1944, on the theory that the taxpayer was a resident of the United States during those years. He contended also that even if the taxpayer were a nonresident, he was taxable on his net capital gains on securities and commodities transactions for the reason that the exchange transactions constituted a trade or business under Section 211(b) of the Internal Revenue Code. (R. 8-9.)

The Tax Court, in a decision not reviewed by the full Court, held that the taxpayer was a nonresident of the United States during the years in question and that he was not engaged in trade or business (R. 18-26.) The Court of Appeals reversed (R. 44-53).

ARGUMENT

I

A. The decision of the Court of Appeals that the taxpayer, during the tax years, was a resident alien[1] is correct and there is no conflict of decisions. The decision was expressly predicated on the application of the Tax Court's findings to the Treasury Regulations,[2] the validity of which has been previously upheld (*Swenson* v. *Thomas,* 164 F. 2d 783, 784 (C.A. 5th); *Myers* v. *Commissioner,* 180 F. 2d 969, 971 (C.A. 4th)), and is not questioned here. The controlling effect of Treasury Regulations, where applicable, has been repeatedly attested by this Court. See, e.g., *Commissioner* v. *South Texas Co.,* 333 U.S. 496; *Commissioner* v. *Wheeler,* 324 U.S. 542; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90.

There is no real question that the result below is fully in accord with the Regulations. They define a "resident" for income tax purposes as "an alien actually present in the United States who is not a mere transient or sojourner." It is apparent that the Regulations use the terms "transient" or "sojourner" synonymously (as the antonym of "resident") to mean one who is in the United States for a "definite purpose" that may be "promptly

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[1] And, accordingly, was not entitled to the preferential tax treatment accorded "non-resident aliens" by Sections 211(a) and 212 (Appendix, *infra,* pp. 15, 17).

[2] Section 29.211-2, Treasury Regulations 111 (Appendix, *infra,* pp. 17-18), applicable for 1943 and 1944 and Section 19.211-2, Treasury Regulations 103, applicable to 1941.

accomplished." They continue, "but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident" notwithstanding that "it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned." The facts found by the Tax Court indicate that taxpayer's original purpose in coming to the United States to stay only a few months as a typical tourist (R. 10-11) was abandoned when, as early as 1939 (R. 11), he decided to remain in the United States because of the "dangers of war time travel and poor health" (R. 13), and, to accomplish that purpose, made the first of a series of applications for the extension of his visa for "one year or the end of the war" in order to remain in the United States until the termination of hostilities in Europe (R. 13). From that time on, his purpose, in the language of the Regulations, was "of such a nature that an extended stay * * * [would be] necessary for its accomplishment, and to that end" he made "his home temporarily in the United States."

The Tax Court's conclusion that taxpayer was a nonresident was reached without even passing reference to the controlling Regulations (R. 18-22) and, as the Court of Appeals correctly noted, was

based (R. 48)[3] on a clear error of law, the confusion of the terms "residence" with "domicile."

The decision below can, moreover, be fully justified even independently of the Regulations. In *Helvering* v. *Stockholms &c. Bank,* 293 U.S. 84, 89-90, this Court stated that the general purpose of the provisions of the revenue laws dealing with nonresidents was to "put money into the federal treasury" and that "there is manifest * * * an intention on the part of Congress to bring about a generous attainment of that object * * *." The Court continued that far from intending to discriminate in favor of foreign corporations, if any discrimination had been intended it would have been made in favor of, "not against," the domestic corporation "which contributes in a much more substantial degree to the support of the people and government of the United States."

These principles, as applied to individuals, were unqualifiedly reaffirmed in *Commissioner* v. *Wodehouse,* 337 U.S. 369, 378. On the basis of these

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[3] The Tax Court quoted *Barhydt* v. *Cross,* 156 Iowa 271, with approval as follows (R. 20): "It is therefore very generally agreed that the words 'resident' or 'inhabitant,' in statutes referring to taxation, are synonymous with the legal term 'domiciled'; and that a man must pay his taxes as a 'resident' at his place of domicile * * *." The remainder of the opinion (R. 20-26) demonstrates that it was the application of this misconception of the meaning of "resident" in the Internal Revenue Code to the uncontested facts that resulted in the patently erroneous conclusion which the decision of the Court of Appeals corrected.

cases, we think the Court of Appeals correctly interpreted the statute when it said (R. 47):

> We find nothing in the law or in the facts to justify the exemption of this alien, who had lived in our country during the war years because of the difficulties and dangers of departure, and who had availed himself of his presence here to make a fortune by trading on our exchanges, from taxes required of others by the country whose protection he had enjoyed and whose economic organization he had utilized for his profit.

B. The contention (Pet. 6-7) that the writ should issue because in this case there is presented for the first time to this Court the effect of an "enforced" stay in determining residence is not only not a good ground for the issuance of the writ in view of the obvious correctness of the result below on the basis of conformance with the Regulations and the controlling rules of statutory construction in this field, but the record falls short of even establishing that taxpayer's presence was due to constraint.[4]

C. The contention (Pet. 7) that this case directly "conflicts in principle" with *McGrath* v. *Kristensen,* 340 U.S. 162, and (Pet. 8, 9) *Neuberger* v. *United States,* 13 F. 2d 541 (C.A. 2d), "as well", is without foundation. Neither case dealt with the

[4] The Tax Court's findings fairly evaluated, as the Court of Appeals accurately noted (R. 50), show at best taxpayer's preference to remain in the United States because of "difficulties" in obtaining visas, dangers of foreign travel, and the condition of taxpayer's health.

term "resident" as used in the Internal Revenue Code.[5] The opinion of the Court in *Kristensen* expressly observed (p. 175), after citing the Regulations applicable here, that "The definition [of resident] varies with the statute." The refusal of the Court to hold (p. 176) that Kristensen was a resident "without regulations so defining residence" in itself conclusively distinguishes this case where the Regulations direct the result.

D. The attack on the decision below (Pet. 9-11) on the ground that the court exceeded its proper scope of review on the basis of the decisions in *United States* v. *Real Estate Boards,* 339 U.S. 485, and *United States* v. *Yellow Cab Co.,* 338 U.S. 338, is without foundation. The decision below (R. 45, 47) was expressly and accurately predicated on the findings of the Tax Court. The alleged *"de novo"* findings (Pet. 9, 10, 11) were no more than paraphrases of the findings of the Tax Court. The disagreement of the Court of Appeals with the Tax Court was with the construction of the statute and not at all with its view of the evidentiary facts.

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[5] The "striking" factual parallel between this and the *Kristensen* case to which taxpayer directs attention (Pet. 8) is superficial. The uncontroverted allegation of Kristensen's complaint was that the outbreak of World War II prevented his return to Denmark and that "economic necessity" forced him to become employed (340 U.S. 162, 165). These circumstances should be contrasted with the facts set out in note 4, *supra.* Similarly, in the *Neuberger* case, it was assumed, "for the purposes of this appeal", that Neuberger's stay in Germany was wholly involuntary. 13 F. 2d at 542.

II

A. The court below also concluded that taxpayer's net capital gains from his vast security and commodity speculation were subject to tax because earned from a trade or business under Section 211(b) of the Internal Revenue Code, Appendix, *infra,* pp. 15-17. That conclusion was at most an alternative holding because the court's conclusion that taxpayer was a resident in itself subjected taxpayer to the same tax not alone on his exchange profits, but on his gain from all other sources as well, without regard to Sections 211 and 212 (Appendix, *infra,* pp. 15-17) which deal only with nonresidents.

There is, then, no basis for issuance of the writ on the trade or business issue because that inquiry is not relevant unless there is a determination adverse to the Commissioner on the residence issue.

B. But even if the issue were properly in the case, there would be no basis for issuance of the writ. Taxpayer asserts (Pet. 11) that the "plain, simple and unequivocal language" of the statute requires the conclusion that a nonresident who places his exchange orders through resident brokers, as indeed under the organization of the exchanges all who would trade must do, is exempt from tax. But such a construction of the statute would exempt from tax all gain by nonresidents from security and commodity speculation. The

structure of the statute, its history[6] and the applicable rules of construction (*Helvering* v. *Stockholms &c. Bank, supra; Commissioner* v. *Wodehouse, supra*), preclude this result. Moreover, as the Court of Appeals noted (R. 52-53), this result was required by its decision in *Adda* v. *Commissioner,* 171 F. 2d 457 (C.A. 4th), certiorari denied, 336 U.S. 952, where that court thought (R. 53) the decision of the Tax Court (10 T.C. 273) "was so clearly correct that we affirmed with a per curiam opinion * * *."

C. The assertion that the decision conflicts with *Higgins* v. *Commissioner,* 312 U.S. 212 (Pet. 14-17), is without foundation. *Higgins* dealt not with speculation in commodities or securities, as here, but with the conservation of an estate. As this Court said (p. 218), "The petitioner merely

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[6] The provision excluding from trade or business "the effecting, through a resident broker, * * * of transactions in the United States in commodities * * * or in stocks" upon which taxpayer relies was added in executive session of the Senate Finance Committee at the suggestion of the Treasury Department (Confidential Hearings Before Committee on Finance, 74th Cong., 2d Sess. (Part 11), p. 46), and was intended as a clarifying amendment (S. Rep. No. 2156, 74th Cong., 2d Sess., pp. 21-22 (1939-1 Cum. Bull. (Part 2) 678, 691)). The amendment was thought desirable to put at rest the controversy which had arisen with respect to whether corporations were carrying on businesses in this country solely as a result of transactions effected from abroad through resident brokers. See *Union Internationale de Placements* v. *Hoey,* 96 F. 2d 591 (C.A. 2d). Moreover, the statute itself by the phrase "in the United States" strongly implies, what a common sense construction requires, that the exclusory provision is concerned only with nonresidents not physically in the United States.

kept records and collected interest and dividends from his securities, through managerial attention for his investments." Moreover, the conclusion that extensive speculation can constitute a trade or business finds direct support in numerous other decisions. Cf. *Snyder* v. *Commissioner,* 295 U.S. 134, 139; *Adda* v. *Commissioner, supra; Fuld* v. *Commissioner,* 139 F. 2d 465 (C.A. 2d); *Dart* v. *Commissioner,* 74 F. 2d 845 (C.A. 4th); *Wiesler* v. *Commissioner,* 6 T.C. 1148, affirmed without discussion of this issue, 161 F. 2d 997 (C.A. 6th); see *Gruver* v. *Commissioner,* 142 F. 2d 363, 367 (C.A. 4th); *512 W. Fifty-Sixth St. Corp.* v. *Commissioner,* 151 F. 2d 942, 943 (C.A. 2d); and see also *Helvering* v. *Winmill,* 305 U.S. 79.

D. Finally, there is no conflict even if taxpayer is correct (Pet. 16) that *Burnett* v. *Commissioner,* 118 F. 2d 659 (C.A. 5th), and *Helvering* v. *Wilmington Trust Co.,* 124 F. 2d 156 (C.A. 3d), reversed on other grounds, 316 U.S. 164, hold that speculation in securities does not constitute a "trade or business" under Section 23(a) of the Internal Revenue Code. Whatever the proper result is under that section, it is clear that Section 211(b) must include buying and selling commodities or the exclusion from the definition for those who effect such transactions in the United States through resident brokers is without meaning.

CONCLUSION

The decision below is correct. There is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL, 1951.

APPENDIX

Internal Revenue Code:

SEC. 211. TAX ON NONRESIDENT ALIEN INDIVIDUALS.

(a) *No United States Business or Office.*—

(1) *General Rule.*—

(A) [As amended by Sec. 106(a) and Sec. 160(e) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Imposition of Tax.*—[1] There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 11 and 12, upon the amount received, by every nonresident alien individual not engaged in trade or business within the United States, from sources within the United States as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that * * *

(b) [As amended by Sec. 160(d) and Sec. 167 of the Revenue Act of 1942, *supra.*] *United*

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[1] The above provision is the form effective for the years beginning in 1942. The differences in the 1941 provision are not material to any issue of this case and is, therefore, not reproduced here.

States Business or Office.[8]—A nonresident alien individual engaged in trade or business in the United States shall be taxable without regard to the provisions of subsection (a). As used in this section, section 119, section 143, section 144, and section 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year, but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation, not engaged in trade or business within the United States, by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of ninety days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such phrase does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States in commodities (if of a kind customarily dealt in on an organized

[8] The above provision was effective for the taxable year 1942 and following years. This section as effective for 1941, prior to its amendment by Section 160(d) of the Revenue Act of 1942, *supra*, contained the phrase "or having an office or place of business therein" following the phrase "trade or business in the United States." Section 167 of the Revenue Act of 1942, *supra*, changed the 1941 provision by substituting the last sentence as set out above for the following: "Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities through a resident broker, commission agent, or custodian." Inasmuch as these changes are not material to the issues which we here raise, the Code provisions will be referred to as if they were identical for all of the three taxable years involved here.

commodity exchange, if the transaction is of the kind customarily consummated at such place, and if the alien, partnership, or corporation has no office or place of business in the United States at any time during the taxable year through which or by the direction of which such transactions in commodities are effected), or in stocks or securities.

* * * * *

(26 U.S.C. 1946 ed., Sec. 211.)

SEC. 212. GROSS INCOME.

(a) *General Rule.*—In the case of a nonresident alien individual gross income includes only the gross income from sources within the United States.

* * * * *

(26 U.S.C. 1946 ed., Sec. 212.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:[9]

Sec. 29.211-2. *Definition.*—A "nonresident alien individual" means an individual—

(a) Whose residence is not within the United States; and

(b) Who is not a citizen of the United States.

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[9] These Regulations are effective for taxable years 1943 and 1944. Treasury Regulations 103, effective for the year 1941, are not reproduced here since in all relevant respects they are essentially the same as Treasury Regulations 111.

The term includes a nonresident alien fiduciary.

An alien actually present in the United States who is not a mere transient or sojourner is a resident of the United States for purposes of the income tax. Whether he is a transient is determined by his intentions with regard to the length and nature of his stay. A mere floating intention, indefinite as to time, to return to another country is not sufficient to constitute him a transient. If he lives in the United States and has no definite intention as to his stay, he is a resident. One who comes to the United States for a definite purpose which in its nature may be promptly accomplished is a transient; but if his purpose is of such a nature that an extended stay may be necessary for its accomplishment, and to that end the alien makes his home temporarily in the United States, he becomes a resident, though it may be his intention at all times to return to his domicile abroad when the purpose for which he came has been consummated or abandoned. An alien whose stay in the United States is limited to a definite period by the immigration laws is not a resident of the United States within the meaning of this section, in the absence of exceptional circumstances.

* * * * *

Sec. 29.211-7. *Taxation of nonresident alien individuals.*—

* * * * *

(c) *United States business.*—

* * * * *

As used in sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year but does not include the performance of personal services for a nonresident alien individual, foreign partnership, or foreign corporation not engaged in trade or business within the United States by a nonresident alien individual temporarily present in the United States for a period or periods not exceeding a total of 90 days during the taxable year and whose compensation for such services does not exceed in the aggregate $3,000. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian. (See also section 29.212-1.) * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 619

ZAREH NUBAR,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

HENRY MANNIX,
Counsel for Petitioner.

CHARLES K. RICE,
Of Counsel.

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The brief of the respondent in opposition to the petition for a writ of certiorari herein contains erroneous and misleading statements of such importance as to require the filing of a reply brief on behalf of the petitioner. These will be discussed in the order in which they appear in the respondent's brief.

I

The Residence Issue

1. Respondent states (Br. 6) that "There is no real question that the result below is fully in accord with the Regulations." Nothing could be more inaccurate. There is absolutely nothing in the Regulations which defines a sojourn within the United States made necessary by war

time conditions as constituting residence for Federal income tax purposes. The Regulations are completely silent on this matter just as were the regulations considered by this Court in *McGrath* v. *Kristensen,* 340 U. S. 162. The provision of the Regulations relied on by the respondent in his brief has nothing to do with the consequences of an enforced stay and deals only with the residence status of an alien who voluntarily *comes to the United States* for a purpose of such a nature that an extended stay is necessary for its accomplishment. Such provision of the Regulations has no bearing on the instant case, not only because it does not deal with the consequences of an enforced stay, but also because the petitioner herein *came to the United States* for admittedly temporary purposes of such a nature that they might be promptly accomplished (R. 11).

2. The error committed below was not that of the Tax Court in confusing the terms "domicile" and "residence" (Br. 8), but that of the Court of Appeals in failing to apprehend the significance of the volitional element which is basic to residence in whatever statute the term may be found. Whatever remarks the Court of Appeals may have made concerning the theory of residence applied by the Tax Court, it is unmistakably clear that the Court of Appeals itself was confused as to the essential meaning of the term "residence."

3. With the principle cited by respondent (Br. 8) that the purpose of the revenue laws is to put money into the federal treasury, there can be no quarrel. Such principle, however, is clearly no justification for the distortion of accepted principles of law applicable to the concept of residence. That hard cases make bad law was never more clearly illustrated than in the instant case. In the March 1951 issue of the Columbia Law Review, in an article entitled *"The Residence Concept and Taxation of Foreign Income"* (51 COLUMBIA L. REV. 378), it is stated (pp. 384, 385) that *"In the Nubar case, the court achieved the desired result by a strong-arm application of the residence*

concept," and the article forecasts that *"In view of the absence of any of the usual indicia of residence in the war enforced stay situation, it will not be surprising if the Nubar decision is not followed."* (italics added). The decision in the instant case clearly warrants this adverse criticism.

4. Respondent's contention (Br. 9) that the record falls short of establishing that petitioner was under constraint is clearly without foundation. As indicated in the petition herein (p. 4), the constraint was of two types: (1) inability of the taxpayer to return to his home in Europe due to war conditions, and (2) inability under the immigration laws to remain in the United States beyond the period necessary for enforcement of the orders of arrest and expulsion. Either type of constraint would have prevented the petitioner from exercising the free choice and free will essential to establishing a residence in the United States.

The respondent does not even attempt to deny that constraint of the second type existed and the record admits of no such denial. The Court of Appeals in the *Kristensen* case (179 F. 2d 796) expressly based its decision both on the ground of the alien's inability to return to his home in Europe and on the ground that the alien was subject to an order of arrest and deportation. As the Court of Appeals said in that case (p. 801), when the "deportation warrant issued against him, any prospect of his stay developing what it lacked, the limited degree of permanence required for residence, was foreclosed to him." Moreover, if the petitioner in the instant case had remained continuously at Ellis Island throughout this period, surely no one would contend that he had become a resident of the United States. When he was released on bond and "thereby [his] prison bounds were enlarged * * *, the nature of [his] stay within the territory was not changed. [He] was still in theory of law at the boundary line and had gained no foothold in the United States" (Mr. Justice Holmes in *Kaplan* v. *Tod*, 267 U. S. 228, 230).

In addition, the findings of the Tax Court clearly establish a case of constraint of the first type through petitioner's inability to return to his home in Europe. The Tax Court specifically found that "war time conditions made his return to either France or Switzerland either impossible or hazardous" (R. 21) and found further that petitioner "remained in the United States after January 15, 1941, because of the obstacles which war time conditions put in the way of his leaving this country" (R. 22).[1] A clearer finding of constraint would be difficult to imagine. The instant case is squarely within the pattern of the *Kristensen* and *Neuberger* cases.

5. Respondent's allegation (Br. 10) that the findings of the Court of Appeals "were no more than paraphrases of the findings of the Tax Court" is a gross misstatement. Contrast the findings of the Tax Court quoted above with the finding of the Court of Appeals (R. 50) that the petitioner's original temporary purpose in coming to the United States "was superseded after the war had commenced and travel had become difficult and dangerous by the purpose to remain in the country until after the war." Further evidence that the Court of Appeals was making its own *de novo* findings of fact is found in its conclusion that the petitioner's purpose changed "after the war had commenced", i.e., in *September 1939*, to a purpose to remain in the United States for the duration of the war. Contrast with this the Tax Court's finding that when the petitioner sought to enter Mexico in *April 1940*, it "was petitioner's intention then not to return to the United

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[1] In *J. H. Marsman*, T. C. Memo. Dec. Docket Nos. 18590, 18591 (1950 P-H T. C. Memo. Dec., Par. 50,038), the Tax Court distinguished its own *Nubar* decision by stating that "the petitioner in that [Nubar] case had the intention to leave the United States but was prevented by restrictions on travel." Apparently the same ground served as a distinction between the Tax Court *Nubar* decision and the later case of *Ceska Cooper*, 15 T. C. 757, reviewed by the Tax Court *en banc*.

States" (R. 12). Contrast as well the findings of the Tax Court as to petitioner's efforts to go to France and Switzerland in 1940 and 1941 (R. 12, 13).[2]

The Tax Court was fully aware of the fact that petitioner in 1939 had requested an extension of stay for "one year or the end of the war" (R. 13).[3] It obviously considered that if any adverse inference were to be drawn therefrom, it was heavily outweighed by the vast amount of evidence, documentary and otherwise, indicating that petitioner desired, intended and attempted to leave the United States (R. 11-13). It was not within the power of the Court of Appeals which did not see or hear the witnesses to adopt, on the basis of an isolated piece of evidence, a different construction of the facts.

6. *Finally, but most important, the Court of Appeals in its opinion gave express approval to the erroneous doctrine that a person unable to leave the United States must be deemed to intend to remain in the United States and thereby becomes a resident (R. 50).* This concept directly conflicts in principle with the *Kristensen* and *Neuberger* cases (Pet. 11).

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[2] It is true that petitioner made no further efforts to leave after August 1941, but after that date the theatre of war steadily expanded and the visa and other travel difficulties increased enormously. Even the immigration authorities found it impossible or impracticable to deport petitioner (R. 21). Many other aliens were similarly stranded (see Pet. 3, fn. 1). The Tax Court was fully justified in finding that petitioner desired to leave but was unable to do so.

[3] Petitioner had not at that time completed his temporary purposes in coming to the United States. His subsequent actions in attempting to continue on to Central and South America and thereafter in attempting to return to Europe and his oft expressed statements of intention clearly negatived, the Tax Court found, any contrary inference to be drawn from the 1939 statement.

II

The Doing Business Issue

This point requires only a brief reply. Respondent does not even attempt to refute the arguments of petitioner as to the construction of Section 211(b) (Pet. 11-13). We need only add therefore that if Congress had intended to exclude nonresident aliens physically present in the United States from the coverage of the Section, it would have been an easy matter to do so. It knew that in ordinary and in legal parlance the term "nonresident alien" includes such aliens. Its failure to exclude them leaves no room for the construction adopted by the Court below.

No sound reason exists why the *Higgins* doctrine which has already been applied by the Circuit Courts under sections of the Code other than 23(a) should not also apply under Section 211(b). To so apply it is in no way derogatory of the exclusion now found in Section 211(b) relating to transactions with resident brokers since such provision was inserted in the statute long before the *Higgins* doctrine was promulgated by this Court and at a time when it was thought that even personal investment activities of the sort engaged in by Higgins might constitute engaging in trade or business.

As to the scope of the *Higgins* doctrine, it is noteworthy that in one paragraph (Br. 13), respondent cites cases indiscriminately, both those arising under Section 23(a) of the Code and those arising under other sections of the Code, to prove that speculation in securities for one's own account may constitute engaging in trade or business under Section 211(b). In the next paragraph, he contends that the cases cited by petitioner holding that such speculation does *not* constitute engaging in trade or business under Sec-

tion 23(a) are not in point under Section 211(b). The fact is that the Circuit Court decisions on this point are clearly in conflict, as respondent in effect concedes (Br. 13), and the conflict is one which this Court should resolve.

Respectfully submitted,

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Of Counsel.